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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAR 27 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition in November 2006, the petitioner was a J-1 nonimmigrant postdoctoral fellow at the Smithsonian Environmental Research Center (SERC), Edgewater, Maryland. The record shows that, in mid-2007, the petitioner left SERC and began working for the Harte Research Institute for Gulf of Mexico Studies (HRI) at Texas A&M University-Corpus Christi. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits arguments from counsel.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In an introductory statement, counsel stated that the petitioner’s “expertise lies in the area of oceanography. His research focus has been on developing mathematical models of ecosystems.” In a personal statement, the petitioner described his educational background and his research:

My Ph.D. research [at Old Dominion University (ODU), Norfolk, Virginia] is focused on developing mathematical models for estimation of primary production and carbon

flux in Antarctic coastal waters. . . . The estimates of primary production obtained from the models have been incorporated into box models, constructed for various Antarctic coastal environments, along with simulated flow fields obtained from a numerical circulation model . . . to further investigate carbon flux and fate. Using numerical techniques, I was able to derive, for the first time, the empirical cloud-cover algorithm for calculation of surface irradiance in Sub-Antarctic and Antarctic coastal environments. . . .

My postdoctoral supervisor [at SERC] is [REDACTED] and our research efforts focus on the shallow tributary embayments and small tidal creeks of Chesapeake Bay and we are developing a shallow-water coastal habitat model for regional scale evaluation of management decisions in the Chesapeake Bay region. . . . The main objective of this project is to analyze how the geographic variability in physical structure and human use among the linked watershed-subestuary systems of Chesapeake Bay affects estuarine responses to multiple stressors.

[REDACTED] stated that the petitioner's "research on the amount of light arriving at the ocean surface resulted in development of new algorithms for estimating cloud cover effects on incident radiation in the Antarctic environment."

[REDACTED] of the University of California, Santa Barbara, stated:

[The petitioner] was the graduate student of a long time collaborator of mine, Professor [REDACTED]ic]. . . . I served on [the petitioner's] doctoral thesis, collaborated with him on advancing optical modeling of coastal primary production and hosted his training in my laboratory during portions of his thesis work. . . .

[The petitioner] has contributed towards the advancement of coastal oceanography by advancing the computational tools and mechanistic/predictive modeling of the impact of ocean current circulation at the edge of continental shelves on nearshore system dynamics that regulate productivity in the coastal zone. He has employed such models to show that episodic forcing by major currents . . . , resulting in intrusions of bottom water across the continental shelf, shift ecological dynamics in a major way and result in major shifts in the export of organic carbon off the shelves to ocean deep. Such large circulation-biological system models have several nested components. [The petitioner] provided a new radiation model as a nested component in the system model for the West Antarctic Peninsula coastal region. . . . Such comprehensive modeling based upon real world scenarios [is] indispensable to identifying environmental forcing mechanisms that cannot be realized by expeditionary oceanography alone. Because of our collaborative research, we proposed a new paradigm for system dynamics for the continental shelf waters of the west Antarctic Peninsula that has shifted the manner of field research and coastal modeling of biological activities.

[REDACTED], a Phytoplankton Ecologist at SERC, stated:

[The petitioner] is conducting research on a topic relating to the responses of shallow subestuaries of Chesapeake Bay to inputs of freshwater, sediments, and nutrients from watersheds differing in their land use. . . . The importance of these systems for their habitat value is increasingly being appreciated, and [the petitioner's] work has significantly contributed to that improved understanding.

[REDACTED], Senior Staff Scientist at SERC, stated:

[The petitioner's] main activity [at SERC] has been constructing a mathematical model of the shallow water ecosystem in the Chesapeake Bay. . . . Of all the candidates we interviewed, none had qualifications and expertise comparable to [the petitioner's]. . . .

I . . . was the co-chief scientist of a research expedition to the Ross Sea during October through December 2005. . . . [The petitioner] joined my group to assist in making shipboard measurements of primary productivity as affected by UV exposure. His dedication and proficiency in field operations . . . was a key contribution to our very successful research campaign.

[REDACTED] a Research Hydrologist with the U.S. Army Corps of Engineers Engineer Research and Development Center, Vicksburg, Mississippi, stated: "I have known [the petitioner] over ten years. . . . [The petitioner's] works exemplify the versatility of his expertise covering from comprehensive three dimensional hydrodynamic modeling to physiology of marine organisms and other water quality parameters in aquatic environment." Dr. [REDACTED] did not discuss the petitioner's findings in any detail.

The petitioner submitted copies of his published articles, and documentation of his conference presentations, but no documentary evidence of the impact of this work. An exhibit list included with the initial filing identified two documents as "Published Material About the alien and his work." One of these documents is a page from the trade publication *Eos*. A section headed "Geophysicists" is subdivided into three subsections: "In Memoriam" named four recently deceased individuals, "Recent Ph.D.s" reported that the petitioner had received his doctoral degree, and "Honors" identified two individuals who recently received awards. In context, it is clear that the petitioner was named here not because his work was especially significant, important or influential, but because he had recently received a doctoral degree.

The other document is not, itself, published material. Rather, it is a copy of an electronic mail message from May 2005, informing the petitioner that "a reference to your publication was added to the Bibliography on Cold Regions Science and Technology, a bibliographic database covering the scientific literature of the cold regions since 1951." The message gave no indication that the petitioner's publication was included for any reason other than its subject matter. Therefore, there is no evidence

that the inclusion of the petitioner's (unidentified) publication in this database is a sign of special merit or influence in the field.

On February 11, 2008, the director instructed the petitioner to submit evidence of the petitioner's influence on his field, including copies of articles containing citations to the petitioner's work. In response, the petitioner submitted three exhibits under the heading "Published Material About the alien," as follows:

- A list of six articles, published between 1997 and 2003, that contain citations of a 1995 article by the petitioner;
- A second copy of the previously submitted electronic mail message regarding the *Bibliography on Cold Regions Science and Technology*; and
- An entry from the *Coastal & Estuarine Science News Archive*, reporting on a 2007 study by the petitioner and co-authors relating to submerged aquatic vegetation in Chesapeake Bay. The news archive is maintained by CERF, the Coastal and Estuarine Research Foundation, and the petitioner's study appeared in *Estuaries and Coasts*, a CERF publication. The archive story, therefore, is not evidence that the petitioner's article had attracted attention outside of the entity that published it.

The petitioner's response included more witness letters. Most of this group of witnesses had studied, worked or collaborated with the petitioner, and most of the letters contain little new information about the work that the petitioner had conducted prior to the petition's filing date. Professor [REDACTED] the petitioner's current supervisor at HRI, stated:

[The petitioner] was hired to help me implement models of marine ecological interactions between organisms and the environment. . . . I am absolutely impressed by the very high quality and quantity of his work. He has helped organize data, build mathematical equations describing ecological relationships, and run simulations of environmental change as it relates to fresh water flowing to coastal and estuarine environments. The significance of this work is that it can be used to determine the quantity of flows needed for environmental protection and sustainability.

[REDACTED] praised the petitioner's previous work in very general terms but offered few details. Also at HRI, [REDACTED] praised the petitioner's "many innovative and valuable contributions to ecological monitoring," while HRI Director [REDACTED] described the topics affected by the petitioner's research, "such as the production of plankton in southern ocean environments," while saying little about the petitioner's contributions in those areas.

The petitioner's work at HRI shows that he continues to perform the same type of work that he previously performed at SERC, but his achievements at HRI cannot establish eligibility in this proceeding because he did not work at HRI until after the petition's filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing; subsequent developments cannot retroactively establish eligibility. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr.

1971). Even then, the letters that discuss the petitioner's work at HRI tend to describe the overall projects rather than the petitioner's special contributions to those projects.

Only three of these witnesses claim no specific connection to the petitioner. Professor [REDACTED] of the University of Connecticut praised the petitioner's "broad international field experience" and stated "I expect [the petitioner] to be an effective and productive researcher," but did not discuss the impact of the petitioner's past work. He indicated only that the petitioner is well-positioned for a career as a researcher.

[REDACTED], President of the Korea Maritime Institute, stated that the petitioner "developed a method that integrates climate change scenarios . . . with marine ecosystem dynamics model. His technique allows for predictability of coastal ecosystem responses and implications of future climate change."

[REDACTED] of the University of Maryland stated:

I am familiar with [the petitioner] through the recognition of his work, and I have not actually worked personally with him during my career. I am well-versed with the research he conducted while he was working at the Old Dominion University. His research topic includes the role of ecosystems and clouds in the carbon cycle and sequestration of carbon in the Southern Ocean. [The petitioner's] findings are extremely important for the global carbon cycle since carbon budget cannot be estimated and future scenarios can not be adequately constrained without understanding the role of the Southern Ocean which is an indicator ocean due to its unique response to climate variability and change. . . . [The petitioner] developed a technique which has allowed us to estimate light penetration in the Chesapeake Bay, which is very important in the dynamical downscaling of global climate and for constructing future scenarios for the health of the Bay. . . .

[The petitioner's] research was very important to my own work, as I lead the Chesapeake Bay Prediction project here at the University of Maryland. His research in regards to this is widely referred to in our field. . . . He is a top level member of [the] oceanic and ecosystem research community.

The record does not offer the level of support that one might expect if the petitioner were as influential as some witnesses claim. The descriptions of evidentiary exhibits are frequently exaggerated. We have already discussed what is said to be "Published Material About the alien." Another example of this hyperbole is the section of the record headed "Requests for [the petitioner] to Publish or Present his Research Work," with the subtitle "Emails and other correspondences asking for [the petitioner] to compose scholarly publications or present his findings." One of these "requests" is nothing more than a commercial message indicating that the journal *Antarctic Science* "is increasing from 4 to 6 issues a year." The message contains a link labeled "Submit your latest research online." The petitioner received the message because he is "someone who has previously published research in Antarctic

Science” (emphasis in original). Another message relates to standard National Science Foundation reporting requirements. Yet another message consists of referees’ notes on manuscripts that the petitioner had already submitted for publication, indicating that the articles required significant revision before they would be suitable for publication. Most of the correspondence in this section of the record dates from after the petition’s November 2006 filing date; the remaining correspondence is undated.

The director denied the petition on June 6, 2008. The director acknowledged various evidentiary submissions but stated that the petitioner had documented only minimal citation of his published work, and that the various witnesses “speak of the beneficiary’s work and experience only in general terms” and do not establish that the petitioner’s work has had much impact outside of institutions where he has worked and studied.

On appeal, counsel argues that “citations are not the only measure of [the petitioner’s] impact upon his field and are not required to establish ‘a degree of influence.’” While it is certainly true that citations are not the only means by which the petitioner can demonstrate his impact on his field, it is equally true that some kind of objective evidence is needed to establish that impact.

Counsel stated that the director’s “decision acknowledges the value of both [the petitioner’s] Memberships and Awards.” It is more accurate to state that the director acknowledged the petitioner’s submission of evidence of memberships and awards. The director did not state that this evidence indicated eligibility for the waiver. At best, this evidence would count toward a finding of exceptional ability under 8 C.F.R. §§ 204.5(k)(3)(ii)(E) and (F). By the plain wording of the statute, exceptional ability in the sciences is not presumptive grounds for the waiver; aliens of exceptional ability in the sciences are generally subject to the job offer requirement.

Counsel refers to various exhibits submitted previously, and states: “It is clear that [the petitioner’s] work is considered novel, important, and original in his field, and that it has made a tremendous impact in that field.” This conclusion is not “clear” as counsel contends. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, as discussed above, the record contains demonstrably exaggerated descriptions of various materials submitted in support of the petition, which cast a shadow over the rest of the record. Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel quotes from previously submitted witness letters, and states “the above quotations . . . clearly give specific details about [the petitioner’s] past accomplishments in his field” (counsel’s emphasis). We agree with counsel insofar as the director was overly broad in asserting that all of the witnesses’ letters were general and lacking in specific detail. While a number of the letters are indeed very general, some contain specific discussion of the petitioner’s work on various projects. Nevertheless, the lack of specificity is not the only factor that kept the letters from qualifying the petitioner for the waiver. More significantly for our purposes, the letters did not offer credible, objective evidence that the

petitioner's efforts have had more impact or influence within his field than other qualified researchers in the same specialty. While some witnesses have claimed that the petitioner has significantly influenced his field and earned international recognition, we cannot ignore the gulf between the claims and the documentary evidence submitted to support those claims.

Review of the evidence of record shows that the petitioner is a competent and well-qualified researcher in an important field of research. The evidence, however, does not persuasively establish that the petitioner's work has distinguished him from others in that field to an extent that would merit the additional benefit of a waiver of the job offer requirement that normally attaches to the immigrant classification that the petitioner has chosen to seek.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.